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 17 THE SWISS CONFEDERATION, THE FEDERAL ATTORNEY GENERAL
 18 OF SWITZERLAND, GERARD SAUTEBIN AND BRENT HOLTKAMP
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UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA
 SAN FRANCISCO DIVISION

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OLIVER HILSENRATH, ET AL.,) No. C-07-2782-WHA
 Plaintiffs,) E-Filing
 v.) MOTION OF DEFENDANTS THE
 THE SWISS CONFEDERATION, THE) SWISS CONFEDERATION, THE
 FEDERAL ATTORNEY GENERAL OF) FEDERAL ATTORNEY GENERAL
 SWITZERLAND, GERARD SAUTEBIN,) OF SWITZERLAND, GERARD
 BRENT HOLTKAMP,) SAUTEBIN, AND BRENT
 Defendants.) HOLTKAMP TO STRIKE
) PLAINTIFFS' REQUEST TO CLERK
) TO ENTER DEFAULT
) Date: September 13, 2007
) Time: 8:00 a.m.
) Courtroom: 9, 19th Floor
) Judge: The Hon. William H. Alsup

NOTICE OF MOTION AND MOTION

2 TO PLAINTIFFS HANA HILSENRATH, OLIVER HILSENRATH, NAMA
3 HILSENRATH, LIOR HILSENRATH, ELLA HOPE HILSENRATH, ISAIAH
4 BENJAMIN HILSENRATH, SAUL NATHANIEL HILSENRATH, AND THE
5 LIVING TRUST OF MELANIE AND ANDRE HILSENRATH, IN PROPRIA
6 PERSONA:

7 PLEASE TAKE NOTICE that on September 13, 2007, at 8:00 a.m., or as soon
8 thereafter as the matter may be heard, in the courtroom of the Honorable William Alsup,
9 defendants **THE SWISS CONFEDERATION, THE FEDERAL ATTORNEY**
10 **GENERAL OF SWITZERLAND, GERARD SAUTEBIN and BRENT HOLTKAMP**
11 (collectively, the "Swiss Defendants") will bring on for hearing this motion to strike
12 Plaintiff's Request to Clerk to Enter Default. The grounds for this motion are as follows:
13 (i) the request fails to establish as required by Federal Rule of Civil Procedure 55(a) that
14 The Swiss Defendants failed to timely respond to the complaint because the Plaintiffs' own
15 submissions to this Court establish that Plaintiffs have not served the Swiss Defendants
16 with the summons and complaint; (ii) assuming for argument's sake that Plaintiffs' bare
17 statement that they served the complaint on the Swiss Defendants on June 4, 2007 is
18 sufficient evidence of service, Plaintiffs' request for default was filed before the Swiss
19 Defendant's time to respond would have expired; (iii) even if these other deficiencies were
20 not present, entry of default is not appropriate in this case because the allegations of the
21 complaint establish that this Court lacks subject matter jurisdiction over Plaintiffs' claims
22 because the Swiss Defendants are immune under Foreign Sovereign Immunities Act, 28
23 U.S.C. §§ 1602, et seq., and further establish that Plaintiffs' claims are barred as a matter of
24 law under the Act of State Doctrine; and (iv) as to defendants Gerard Sautebin and Brent
25 Holtkamp, entry of default also is not appropriate because the Court lacks personal
26 jurisdiction over these defendants. This motion is based on this notice of motion and
27 motion, the memorandum set forth below, the motion to dismiss filed concurrently
28

1 herewith, the proposed order filed herewith, such further evidence and argument as may be
 2 presented to the Court on this motion, and all of the Court's files and records in this action.

3 The Swiss Defendants seek an order striking Plaintiffs' Request to Clerk to Enter
 4 Default.

5 **SUPPORTING MEMORANDUM**

6 **I. ISSUES PRESENTED.**

7 A. Whether a request for entry of default under Rule 55(a) of the Federal Rules
 8 of Civil Procedure¹ should be stricken where the affidavits and other material submitted by
 9 the Plaintiffs establish that the Swiss Defendants were not served in accordance with the
 10 requirements of the Foreign Sovereign Immunities Act.

11 B. Whether a request for entry of default under Rule 55(a) should be stricken
 12 where the request is filed before the Swiss Defendants' time to respond to the Complaint
 13 has expired.

14 C. Whether a request for entry of default should be stricken where the Court
 15 lacks subject matter over the case because the Swiss Defendants have sovereign immunity,
 16 and where the action is barred by the Act of State Doctrine.

17 D. As to Defendants Gerard Sautebin and Brent Holtkamp, whether a request
 18 for entry of default also should be stricken where the Court lacks personal jurisdiction over
 19 the individual Defendants.

20 **II. STATEMENT OF FACTS.**

21 As described in further detail in the Swiss Defendant's motion to dismiss the
 22 Complaint, filed concurrently, Plaintiffs in this action have sued the federal government of
 23 the nation of Switzerland and two Swiss government officials. Plaintiffs have purported to
 24 serve the complaint under the Hague Convention of the Service Abroad of Judicial and
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26
 27 ¹ Unless otherwise indicated, all references to Rules are to the Federal Rules of Civil
 28 Procedure.

1 Extrajudicial Documents in Civil and Commercial Matters ("The Hague Convention").²
 2 Under Article 6 of the Hague Convention, proof of service is evidenced by a certificate
 3 issued by the Central Authority of the country in question. No certificate has been issued in
 4 this case.

5 On July 18, 2007, Plaintiffs submitted to the Court a Status Report Re Letter from
 6 Swiss Ambassador in the United States, which included a copy of the Ambassador's letter
 7 and Plaintiffs' reply. Case 3:07-cv-02782-WHA, Documents 11, 12, 12-2, 12-3. These
 8 materials establish that on July 5, 2007, in accordance with the provisions of Article 4 of
 9 the Hague Convention, the Swiss Ambassador informed plaintiffs that their purported
 10 service was ineffective under the Hague Convention, and that the papers were being
 11 returned to plaintiffs. Letter of Swiss Ambassador to Oliver and Hana Hilsenrath, Case
 12 3:07-cv-02782-WHA, Document 12-3. Instead of correcting the deficiencies in service that
 13 had been specifically identified in the Ambassador's letter, Plaintiff's reply letter stated
 14 their refusal to do so. Case 3:07-cv-02782-WHA, Document 12-2. On August 3, 59 days
 15 later, plaintiffs filed the Request to Clerk to Enter Default ("Request"). The Request is
 16 patently defective and should be stricken.

17 **III. ARGUMENT.**

18 **A. The Request Should Be Stricken Because Plaintiffs Have Not Shown By**
 19 **Affidavit Or Otherwise That They Have Served Defendants With The**
 20 **Complaint.**

21 Rule 12(a) provides that a defendant shall serve an answer or other response within
 22 specified time periods after being served with the summons and complaint. Under 28
 23 U.S.C. section 1608(d), foreign nations have 60 days after service of the summons and
 24 complaint to file a responsive pleading. A defendant who has not been served with a
 25 summons and complaint need not file an answer or other response.

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27 ² A copy of the Hague Convention is an appendix to Rule 4 and is Exhibit 5 to the Request
 28 for Judicial Notice in Support of the Swiss Defendants' motion to dismiss.

1 Rule 55(a) provides:

2 When a party against whom a judgment for affirmative relief is sought has
3 failed to plead or otherwise defend as provided by these rules and that fact is
made to appear by affidavit or otherwise, the clerk shall enter the party's
4 default.

5 Plaintiffs filed no affidavit in support of their request for entry of default, but even if the
6 Court were to consider Plaintiff's Status Report as appropriate support, that document does
7 not include a certificate of service under Article 6 of the Hague Convention, and indeed
8 establishes that the Swiss Defendants have not been served. Plaintiffs' attempt at service
9 was patently defective. As discussed in detail in the Swiss Defendants' motion to dismiss,
10 but apparent from the Status report itself, Plaintiffs failed to provide translations of the
11 summons and other submitted documents (except for a partial and unintelligible translation
12 of the Complaint), failed to effect service through a court or other official, and failed even
13 to provide sufficient copies to serve each defendant. Plaintiffs have provided no
14 justification for failing to make any attempt to correct those deficiencies and properly serve
15 the Swiss Defendants. Accordingly, the Swiss Defendants' time for responding to the
16 Complaint has not even commenced to run, much less expired.

17 Accordingly, Plaintiffs' Request does not comply with Rule 55(a) and should be
18 stricken.

19 **B. The Request for Entry of Default Should Be Stricken Because By Any
20 Measure The Time For Defendants To Respond To the Complaint Had
21 Not Passed.**

22 As discussed in Section A above, Plaintiffs' own court submissions establish that
23 they have failed to serve the Complaint at all. However, even if Plaintiffs' claim that they
24 served the Complaint on June 4 were correct, the request for default should be stricken
25 because it was premature. Based on a June 4 service date, the Swiss Defendants would
26 have 60 days to respond to the Complaint, or through August 3, 2007. Plaintiffs' August 3
27 filing was made before by Plaintiff's own measure the Swiss Defendants could be found in
28 default.

1 **C. The Request For Entry Of Default Should Be Stricken Because This**
 2 **Court Lacks Subject Matter Over This Action And Because Plaintiffs'**
 3 **Action Is Barred By The Act Of State Doctrine.**

4 The Court lacks subject matter jurisdiction over this action because the Swiss
 5 Defendants are immune from jurisdiction pursuant to the Foreign Sovereign Immunities
 6 Act, 28 U.S.C. § 1602 et seq. ("FSIA"). Where as here defendants are a foreign state and
 7 its agents, the FSIA presumes immunity. Security Pac. Nat'l Bank v. Derderian, 872 F.2d
 8 281, 285 (9th Cir. 1989). See Chuidian v. Philippine Nat'l Bank, 912 F.2d 1095, 1102-06
 9 (9th Cir. 1990) (government officials sued as individuals for their official acts are immune
 10 under 28 U.S.C. section 1603(b)). Here, no exception to sovereign immunity exists.

11 In addition, the Act of State Doctrine precludes this Court from inquiring into the
 12 Swiss government's conduct of its criminal investigation of Oliver Hilsenrath, including its
 13 order freezing his assets. Credit Suisse v. United States Dist. Court, 130 F.3d 1342, 1347
 14 (9th Cir. 1997).

15 These issues are discussed in detail in the Swiss Defendants' motion to dismiss,
 16 which discussion will not be repeated here. These bars to this Court's exercise of
 17 jurisdiction over this case provide a further and compelling basis for striking plaintiffs'
 18 Request.

19 **D. The Request For Entry Of Default Should Be Stricken As to Gerard**
 20 **Sautebin and Brent Holtkamp Because The Court Lacks Personal**
 21 **Jurisdiction Over Them.**

22 As discussed in the Swiss Defendants' motion to dismiss, Messrs. Sautebin and
 23 Holtkamp lack minimum contacts with the United States and California to support the
 24 exercise of jurisdiction over them. They have no assets here or other contacts with this
 25 forum which would justify the exercise of personal jurisdiction over them. See Burger
 26 King Corp. v. Rudzewicz, 471 U.S. 462, 474-75 (1985). The lack of personal jurisdiction
 27 over these individuals provides an independent basis for striking Plaintiffs' Request as to
 28 them.

1 IV. CONCLUSION.

2 For the foregoing reasons, the Court should strike Plaintiffs' Request to Clerk to
3 Enter Default.

4 Dated: August 6, 2007.

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